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No. 92-1945

In the Supreme Court of the United States

OCTOBER TERM, 1992

THE PITTSTON COMPANY, ET AL., PETITIONERS

v.

UNITED MINE WORKERS OF AMERICA
1974 PENSION TRUST, ET AL.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the district court and the court of appeals correctly determined that the "evergreen clause" to which petitioners agreed in the National Bituminous Coal Wage Agreements ("NBCWAs") of 1978, 1981, and 1984 requires petitioners (and other similarly situated employers) to continue contributions to the respondent multiemployer pension and health plans for as long as successor NBCWAs require such contributions.

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BRIEF OF BITUMINOUS COAL OPERATORS' ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

This brief is submitted by the Bituminous Coal Operators' Association, Inc. ("BCOA"), as *amicus curiae* in support of respondents.[1]

INTEREST OF BCOA AS AMICUS CURIAE

On June 3, 1993, BCOA filed a brief as *amicus curiae* in opposition to the petition filed by Rawl Sales and Processing Company seeking review of the same court of appeals decision that petitioners attack here. *See Rawl Sales and Processing Co. v. United Mine Workers of America 1974 Pension Trust*, No. 92-1775. BCOA respectfully refers the Court to that brief for a statement of BCOA's interest in these proceedings.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

BCOA respectfully refers the Court to the Statement of the Case in its brief in *Rawl*. In that Statement, BCOA described the historical background of the evergreen clause and the reasons for its negotiation and adoption. Although petitioners (collectively "Pittston") ignore the subject, an understanding of the problems that the evergreen clause was designed to address is essential to a proper interpretation of the clause. We therefore adopt here the Statement set forth in our *Rawl* brief.

ARGUMENT

Together, Rawl and Pittston have orchestrated an intricate procedural ballet intended to take advantage of the summer recess of this Court and the 30-day stay of mandate secured by petitioners in the court of appeals. Although the district court remained free during the period of this interlocutory appeal to conduct any further proceedings needed to calculate the precise amount owed by Pittston and Rawl, the district court announced at the time that it authorized the interlocutory appeal under 28 U.S.C. § 1292(b) that it would not proceed further until the appeal was resolved. Pittston and Rawl now hope to use their petitions in this Court as a basis for arguing to the district court that it still should not go forward, and they have timed the filing of their petitions in an effort to forestall action in this Court until the beginning of the next Term.

To a significant degree, Pittston recapitulates many of the factual and legal assertions made by Rawl and, as to those matters, all of the arguments made in BCOA's *Rawl* brief remain applicable. BCOA files this brief only to reply to additional points newly made or emphasized in Pittston's petition.

1. Since the beginning of this litigation in 1988, Pittston has steadfastly opposed the Trustees' interpretation of the evergreen clause, the interpretation endorsed

by the district court and confirmed by the court of appeals. What Pittston has *not* done—and what it does not do even now—is offer any plausible alternative construction of the clause that does not render it mere surplusage. Throughout a motion to dismiss, a two-year discovery period, a district court decision on the merits, a motion for reconsideration, a decision from the court of appeals, a petition for rehearing and a suggestion for rehearing *en banc*, and a petition for certiorari, Pittston has yet to articulate its own interpretation of what the evergreen clause means or why the bargaining parties agreed to it in 1978. At most, Pittston has suggested that the clause means that employers must make the contributions that they have agreed to make. But this is a tautology and would make the evergreen clause unnecessary. If Pittston were correct, the evergreen clause could be deleted in its entirety without any real-world effect. The courts below properly rejected this view.

Rather, as the district court and the court of appeals both held, the evergreen clause obligates any employer accepting it to continue making contributions to the Funds for as long as such contributions are required in that NBCWA or any successor NBCWA. This construction—which the court of appeals correctly called the only reasonable construction—is the only reading that gives the clause force and effect. It does not warrant further review.

2. As BCOA explained in its *Rawl* brief, this case is one of contract interpretation, pure and simple. Relying on notions of waiver and estoppel, Pittston has struggled to remove this case from the realm of ordinary contract interpretation and to place it in a different legal category. These efforts are unavailing.

In many ways, Pittston's argument is more notable for what it fails to say than for what it says. Pittston has not argued that an employer is prohibited, as a matter

of federal labor law, from agreeing to a clause that embodies a continuing obligation of the sort found by the courts below. Nor does Pittston argue that the evergreen clause, as interpreted by the Trustees and the courts below, is an implausible means of accomplishing the bargaining objective identified by BCOA in 1978, or that the bargaining objective of maintaining the broadest possible funding base for a multiemployer benefit plan was the least bit improper or unreasonable for BCOA to pursue at that time. Instead, Pittston simply insists that the evergreen clause does not mean what it says. First, last, and always, this is a case of contract interpretation, not waiver, estoppel, or any more obscure theory.

3. Pittston asserts that the Funds' motion for summary judgment was based "upon extrinsic evidence created thirteen years after the 1978 negotiations and solely for the purposes of this litigation." Pet. 5. This statement is highly misleading. Pittston conveniently ignores what the court of appeals expressly relied upon: the voluminous *contemporaneous* evidence of the negotiating parties' intent in agreeing to the evergreen clause including: "copies of notes and minutes prepared contemporaneously with those negotiations which indicate an intention to create a continuing obligation," "various BCOA and UMWA documents prepared shortly after the negotiations were concluded" evincing the same intent, and "public statements made by negotiators of the evergreen clause which confirmed the Trustees' posited interpretation." Pet. App. 7a-8a. Similarly, Pittston has apparently forgotten that soon after the evergreen clause was negotiated, Donald Pierce—then a UMWA economist and negotiator, later a Fund Trustee, and now the Funds' Executive Director—testified before Congress in public hearings on legislation that became the Multiemployer Pension Plan Amendments Act of 1980, 29 U.S.C. §§ 1381 *et seq.* ("MPPAA"). Mr. Pierce described the evergreen clause, the factual background leading to its

negotiation, and the reason it was negotiated. Both courts below expressly relied on this evidence. Pet. App. 8a, 30a-31a.

Moreover, Pittston's attempt to discredit the declarations submitted by the Trustees in support of their motion for summary judgment employs a rather obvious and unjustifiable double standard. The Trustees' declarations were submitted *before* the district court rendered its decision; the affidavits on which Pittston now seeks to rely were prepared, for litigation purposes, only *after* Pittston had already lost in the district court and was seeking reconsideration.

4. In a similar vein, Pittston charges that before this litigation began, BCOA "engaged in conduct that was directly contrary" to the Trustees' interpretation of the evergreen clause. Pet. 5. The allegation is made, not surprisingly, without citation to the record. It is similarly unsurprising that Pittston does not bother to identify any conduct by BCOA that allegedly substantiates the claim. In fact, the undisputed record before the district court and the court of appeals established that in November 1985, soon after companies like Pittston began attempting to shed their health and pension benefit obligations by negotiating special deals with the UMWA purporting to establish reduced contribution rates, BCOA wrote a nine-page single-spaced letter to the Trustees of the Funds explaining in great detail the purpose, negotiating history, and intent of the evergreen clause and explicitly informing the Trustees that the clause, in fact, means what it says.[2] BCOA has *always* insisted that companies like Pittston are bound by their promises, and Pittston has cited *no* evidence to the contrary either in this Court or below.

5. Pittston asserts that in *Garland Coal and Mining Co.*, NLRB Case No. 16-CA-9999 (1981), "the NLRB

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[2] This letter was before the district court as an exhibit to a pleading in one of these consolidated cases and was provided by BCOA to the court of appeals as an attachment to its brief. We have lodged a copy of this brief with the Clerk of this Court.

. . . confronted the evergreen clause" and "concluded that employers [had] no obligation to contribute to the Trusts [under that clause] after the agreement expires." Pet. 5 n.3. This assertion is false for a number of reasons. First, the National Labor Relations Board never considered the *Garland Coal* case or "confronted" the evergreen clause; Pittston refers not to a decision of the Labor Board but to a decision of an NLRB Regional Director in declining to issue a complaint. The decisions of a Regional Director have no precedential value, *Miller Brewing Co. v. Brewers Local 9*, 739 F.2d 1159 (7th Cir. 1984) (*en banc*), *cert. denied*, 469 U.S. 1160 (1985), and are entitled to no deference. Moreover, the Regional Director's letter in which Pittston places such reliance does not mention the evergreen clause and there is no indication that the Regional Director considered it in deciding not to issue a complaint. Finally, the conclusion reached by the Regional Director was merely that there is no contractual obligation to contribute to the Funds "during a contract hiatus," *i.e. between the expiration of one NBCWA and the execution of its successor.* J.A. 1000. Rather than undercutting the court of appeals' plain reading of the evergreen clause, this conclusion is fully consistent with the interpretation of the clause advocated by the Funds and BCOA and endorsed by the courts below; employers are contractually obligated to contribute to the Funds during the term of the NBCWA to which they are a signatory and *any successor* NBCWA. During any hiatus *between* agreements, there is no NBCWA extant and, accordingly, no contractual obligation to contribute.

6. Pittston cavalierly asserts that the courts below ignored what it calls "substantial evidence" supporting its "interpretation" of the evergreen clause. Both the district court and the court of appeals correctly found, however, that there was no such substantial evidence and that Pittston failed altogether to counter the detailed, volumi-

nous, and overwhelming evidence provided by the Funds from *both* sides of the negotiating table. Pet. App. 8a; *see also*, Pet. App. 31a (Pittston adduced "virtually *no* evidence to rebut the Trusts' showing of intent") (emphasis in original). Even the affidavit evidence submitted by Pittston to the district court *after* Pittston lost on summary judgment failed to rebut the points made by the Trustees. The Funds explained, meticulously and with voluminous evidentiary support from both sides of the negotiating table, precisely what both parties to the negotiations intended, described in detail the back-and-forth progress of negotiations, and provided a comprehensive explanation, from the individuals directly involved in negotiations, of what the evergreen clause was designed to do. In response—and then only in seeking reconsideration —Pittston submitted affidavit testimony from officials of Rawl and Pittston to the effect that no one told "them nor were they aware that" the evergreen clause meant what it said. Pet. 8-9. Such affidavits, however—proclaiming ignorance of the meaning of the evergreen clause—cannot controvert the detailed explanations of both negotiating parties as to what actually occurred at the bargaining table. Simply put, the Funds explained what the clause was negotiated to accomplish; Pittston responded by explaining that its employees were unaware of any such purpose. As the court of appeals properly held, "[t]his evidence falls far short of what is necessary to undermine or contradict the Trustees' evidence." Pet. App. 10a.

7. Having mischaracterized the evidence below, Pittston invites this Court to revisit the standards for granting summary judgment, which the Court addressed at some length in the 1986 summary judgment trilogy: *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986); and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). Pittston's invitation should be declined because the court of appeals' decision is consistent with those de-

cisions. As this Court carefully explained in *Anderson*, *Celotex*, and *Matsushita*, summary judgment may not be avoided merely by raising a "metaphysical doubt as to the material facts" or by pointing to a scintilla of evidence supporting the claims of the non-moving party. *Matsushita*, 475 U.S. at 586; *Anderson*, 477 U.S. at 252. If the evidence supplied by the non-moving party "is merely colorable or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50. The trial court must evaluate the competing presentations of the parties, *i.e.*, "pierce the pleadings and . . . assess the proof in order to see whether there is a genuine need for trial." *Matsushita*, 475 U.S. at 587 (citation omitted). Summary judgment is warranted if the evidence "is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52. Pittston's evidence was insufficient in quantity or quality to support a jury verdict, and judgment for the Funds was entirely appropriate.

8. Pittston insists—as did Rawl—that there is a fundamental inconsistency between the language in Article XX(d) of each NBCWA (which establishes contribution rates and provides that those rates apply only for the term of that NBCWA) and the evergreen clause obligation to make contributions as required by *successor* NBCWAs. The court of appeals aptly noted that the two provisions are complimentary, not contradictory; the first establishes the contribution rates that apply during the term of a particular NBCWA, and the second establishes an obligation to contribute under successor NBCWAs. Pet. App. 6a. There is no inconsistency.

9. A principal thrust of Pittston's brief is that in four or five cases since 1978 (culled from the many hundreds of delinquent pension contribution cases filed by the Trustees during that time), the Trustees have asserted a right to "withdrawal liability" under the MPPAA, 29 U.S.C. §§ 1381 *et seq.*, without regard for the evergreen

clause. Because, under the statute, withdrawal liability arises only after the contribution obligation terminates, Pittston believes it can put these cases to two uses. First, Pittston argues that the cases suggest that at an earlier point in time, the Trustees held a different view of the evergreen clause than they assert in this litigation, and second, Pittston contends that the cases form the basis for application of the doctrine of judicial estoppel. The cases cannot properly be put to either use.

First, none of the cases cited by Pittston involved the evergreen clause. None of the cases contained any allegations, discussions or adjudication regarding the meaning of the evergreen clause and none of the cases presented the kind of problem that the evergreen clause was designed to address, *i.e.*, a financially viable coal company withdrawing from the Funds and leaving its health and pension obligations behind for its competitors to fund. Instead, the employers involved in the withdrawal liability cases were going out of business and, once coal production had ceased, would have had no contribution obligation at all. None of those employers had negotiated a special contribution rate with the Union in violation of the evergreen clause. In these circumstances, the Trustees properly recognized that for an employer going out of business, the fund's remedy was withdrawal liability.

At most, Pittston has identified a few isolated instances in which the evergreen clause could have been, but was not, asserted in circumstances very different from those presented here. Instead of seeking a few weeks or months of additional contributions under the evergreen clause and *then* asserting withdrawal liability against these bankrupt employers, the Trusts in a small number of cases claimed withdrawal liability immediately. On this basis, Pittston seeks complete absolution for all of its evergreen clause liability. As the district court and the court of appeals properly held, there is no basis for awarding Pittston such an immense windfall; Pittston, of course,

was not involved in any of the cases on which it now relies, and there is no evidence that it even knew of these cases at the time they were decided, much less that it relied on them in ordering its business affairs. There is *no* evidence that in filing the cases cited by Pittston, the Trustees were affirmatively asserting a view of the evergreen clause different from that posited here.

For similar reasons, these cases cannot provide a proper basis for the application of judicial estoppel, even assuming, for the sake of argument, that the common law doctrine retains vitality in this era of pleading in the alternative. As the court of appeals noted, even those circuits willing to apply the doctrine use it only "to preclude a party from taking a position that is inconsistent with one successfully asserted by the same party in a prior proceeding. . . . Since the present case involves wholly distinct issues and facts from those of the withdrawal liability cases, the Trustees have not been required to contradict earlier sworn statements or present conflicting interpretations of the evergreen clause to successive tribunals." Pet. App. 13a (citations omitted). At most, the court held, the Funds had, in good faith, asserted alternative theories of liability against different defendants in different cases involving different facts. *Id.* at 14a. Because this case presents no occasion to apply the judicial estoppel doctrine, it is a vehicle ill-suited for determining the propriety of that doctrine's use in the federal courts.

10. Pittston relies heavily on a comment made by Trustee Donald Pierce at a meeting of the Board of Trustees of the UMWA Funds in 1988. Although Pittston only paraphrases the comment, the petitioner declares that Mr. Pierce indicated in the comment that he "believed that coal companies that were signatories to the 1978, 1981, and 1984 NBCWAs did not have a continuing obligation to pay into the Trust." Pet. 8. As a check of the joint appendix citation provided by Pittston con-

firms, the Pierce statement was quite different from its portrayal in the petition. In fact, Trustee Pierce merely expressed the view, not that the evergreen clause means something other than what the Funds now maintain, but that there may be *legal* questions about the clause's enforceability. The record also discloses that Mr. Pierce's fears were not shared by other Trustees. J.A. 921-926.

11. Pittston also attempts to make mileage from the contractual withdrawal liability provision (Article XX (i)) in the 1988 NBCWA. Pittston suggests this provision would have been "superfluous" had the Trustees' current interpretation of the evergreen clause been extant in 1988. In fact, the contractual provision in Article XX(i) is no more than a supplement to the evergreen clause. By its terms, the evergreen clause has no effect if there is no successor NBCWA or if a successor NBCWA does not provide for contributions. In that situation, there would be no evergreen obligation and the contractual withdrawal liability provision would take over. The clause is in no way inconsistent with the decisions below. More fundamentally, as the court of appeals correctly held, evidence purportedly illuminating the intent of the bargaining parties in negotiating the *1988* NBCWA is irrelevant to the intent of the parties in negotiating the *earlier* agreements at issue in this case. Pet. App. 9a n.8. On this latter score, Pittston has not been able to unearth even a scintilla of evidence supporting its view, even after five years of litigation.

12. Pittston decries the "untested" nature of the declarations submitted by the Funds and relied upon by the district court and the court of appeals. Judge Hogan properly put this argument to rest in the district court. As Judge Hogan pointed out, Pittston "had at least two years to conduct discovery." Pet. App. 26a n.11; *see also id.* at 28a n.15. Pittston took no deposition discovery during that period. If the declarations upon which the

Funds relied went "untested," Pittston has no one to blame but itself. Moreover, as the district court observed,

> There is no reason that defendant employers should not have been able to find evidence of contrary negotiating history, if any was there to find. The UMWA has been actively involved in these cases from the very beginning, as *amicus curiae* in the *Pittston* and *Rawl* cases . . . . The UMWA was a negotiating party when the evergreen clause was agreed to in 1978. Certainly if the UMWA had evidence that the clause was not intended to create a continuing obligation, it would have introduced such evidence in these cases.

Pet. App. 31a n.17.

13. Pittston argues that as a result of the Coal Industry Retiree Health Benefit Act of 1992, Pub. L. No. 102-486, 106 Stat. 3037-3056 ("Coal Act"), BCOA will "receive potentially all of the proceeds of the evergreen litigation." Pet. 12 n.6. In fact, neither BCOA nor any of its members will receive any "proceeds" from this litigation. Due to the failure of Pittston and other employers to make contractually mandated contributions to the Funds, the two health benefit trusts now merged into the Combined Fund had reportedly amassed a deficit of approximately $60 million as of February 1, 1993. Under Section 9704(i)(1)(B) of the Coal Act, 106 Stat. 3045, if this deficit is not eliminated through other collections, such as the recovery of delinquent contributions from employers like Pittston, it must be eliminated by signatories to the 1988 NBCWA including, but not limited to, members of BCOA. Accordingly, vindication of the contractual obligations at issue in this case—and the resulting payment of the amount owed by Pittston to the benefit trusts—will reduce on a dollar-for-dollar basis the amounts that the Combined Fund Trustees will seek to collect from *all* employers signatory to the 1988 NBCWA.

14. Rawl attempted to convince this Court that it was a mom-and-pop operation unfairly victimized by the

largest members of BCOA; incredibly, Pittston makes the same claim. This, of course, is nonsense. Pittston, or more precisely, "The Pittston Companies," together constitute the 18th largest producer of bituminous coal in the United States.[3]

15. By alluding to "similar actions" involving the evergreen clause, Pittston attempts to persuade this Court that this case is merely the leading crest of a tidal wave of "evergreen' litigation. Pet. 12 n.5. In fact, the evergreen clause is involved in a total of nine cases. These cases involve the interpretation of a single clause in a single series of collective bargaining agreements applicable to a single industry. The applicability of that clause has been limited by the Coal Act, which evinces Congress' preference for a statutory solution to the problem of retiree health benefits and terminates Pittston's contractual evergreen liability (and that of all other employers) to the 1950 and 1974 Benefit Trusts. This case represents the straightforward interpretation of a *sui generis* contract applicable to only one industry. It poses no issue worthy of certiorari.

16. Pittston decries the "unfair[ness]" of the court of appeals' decision which, it is argued, "saddle[s] petitioners with enormous liabilities." Pet. 13. To the contrary, the decision of the court of appeals says one thing and one thing only: Pittston must abide by its contractual agreement to provide funding for the health and pension benefits received by hundreds of its retirees and for the "orphan" retirees Pittston agreed to support. In order to fund those benefits, the court of appeals has required Pittston to make contributions to the industry-wide multiemployer Funds on the same basis as its industry competitors. There is nothing illogical, unusual, or unfair about that result. Indeed, permitting Pittston to shift to its competitors the cost of funding health and

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[9] Michael deCourcy Hinds, *Bitter Coal Strike May Be At End*, N.Y. Times, December 23, 1989, at A1, col. 1.

pension benefits for *Pittston's own retirees* would be grossly unfair and contrary to the bargain Pittston made in 1978.

17. Without citation, Pittston asserts that the district court "agreed that respondents' interpretation of the evergreen clause amounted to a waiver of petitioners' right to bargain for themselves . . . ." Pet. 16. The district court never concluded that the evergreen clause was anything other than a contractual commitment to provide benefits as required in successor NBCWAs. Although the district court described Pittston's waiver argument, it never agreed with the claim.

18. Pittston cites a number of cases assertedly demonstrating that "[e]very . . . circuit [with the exception of the D.C. and Seventh Circuits] consistently applies the waiver doctrine." Pet. 17-18. Although the cases cited by Pittston arose in a variety of differing factual settings, they share two fundamental characteristics missing from the present case. First, in each of the cited cases, the parties to the agreements in question ended up in court because they disagreed vehemently over the meaning and intent of their bargain; here, negotiators from *both sides* of the collective bargaining table have acknowledged pursuing the same goal and they agree, without dissent, to the same interpretation of their contract. Their testimony in this regard went wholly unrebutted by Pittston. Second, and more fundamentally, in the present case, all parties to the litigation acknowledge that the bargaining parties—the UMWA and BCOA—bargained at some length about, and ultimately agreed upon, a contract term establishing the extent and the duration of the employers' contribution obligations. No one in this case suggests that the topic at issue went unaddressed by the parties at the negotiating table, as in *NLRB v. Challenge-Cook Bros. of Ohio Inc.*, 843 F.2d 230 (6h Cir. 1988), and *Universal Security Instru. Inc. v. NLRB*,. 649 F.2d 247 (4th Cir.), *cert. denied*, 454 U.S. 965 (1981), that the parties agreed to leave resolution of the problem to the unilateral action

of one of the bargaining parties, as in *Ciba-Geigy Pharm. Div. v. NLRB*, 722 F.2d 1120 (3d Cir. 1983), *Challenge-Cook, supra,* and *Universal Security, supra,* or that the failure of the parties to arrive at a negotiated solution warrants an inference of waiver, as in *Intermountain Rural Elec. Ass'n v. NLRB*, 984 F.2d 1562 (10th Cir. 1993), and *United Brotherhood of Carpenters & Joiners Local 2848 v. NLRB*, 891 F.2d 1160 (5th Cir. 1990). All parties here concur that an agreement *was* reached between BCOA and the UMWA as to the duration of the contribution obligation of all signatory employers. The *sole* question posed in *this* case is what that agreement was. "[W]here the matter is covered by a collective bargaining agreement, the [parties have] *exercised* [their] bargaining right and the question of waiver is irrelevant." *Connors v. Link Coal Co.*, 970 F.2d 902, 905 (D.C. Cir. 1992) (emphasis in original).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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